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Supreme Court of the United States

OCTOBER TERM—1948

No. 121

BLACK DIAMOND STEAMSHIP CORP.,
Petitioner,

vs.

ROBERT STEWART & SONS, LTD., *et al.*,
Respondents.

REPLY BRIEF FOR THE PETITIONER, BLACK DIAMOND STEAMSHIP CORP.

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REPLY BRIEF FOR THE PETITIONER, BLACK DIAMOND STEAMSHIP CORP.

I.

The decision of the Court of Appeals.

In the fourth point of their brief (pp. 38, 39) the respondents' counsel, in discussing the lower Court's decision, say: (1) That the Court erred in stating that an allegation in the limitation petition that the Brussels Limitation Convention attaches a limit to the right would have been an allegation of fact; (2) that the Court should have met and decided the issues presented by the petition. We agree with our opponents on both points but naturally differ with them as to what the Court should have decided if it had met the issues.

(1) In drafting the limitation petition we studiously avoided inserting anything in it which might look like a conclusion of law for we were forewarned that the respond-

ents' counsel probably would except to a petition invoking foreign law and we wished to have the allegations so phrased as unquestionably to be allegations of fact which would be admitted by the exceptions. In stating the provisions of the Convention we were of course setting forth matters of fact and it was a surprise to hear from the Court that an allegation by us that the limitation provided by the Convention was a limit attached to the right would also have been an allegation of fact. We supposed that such an allegation would be a conclusion.

Article Twelfth of the petition (R. 7, 8) sets forth the salient provisions of the Convention which need no embellishment from us as they speak for themselves. We therefore believe that it was unnecessary for the Court to read the petition as though it had contained the allegation referred to. That the Convention attaches a limit to the right seems obvious. Article 1 (R. 7) says: "The *liability* of the owner of a seagoing vessel is *limited* to an amount equal to the value of the vessel etc." (Italics ours.) It is just as if the Convention had said that claimants are limited in their recoveries to the vessel's value, plus freight, as determined by the Convention.

(2) Whatever we may think of the District Court's decision, it can at least be admitted that it met the issues presented by the petition and decided them. That its conclusions were adverse to the petitioners and, we believe, erroneous, cannot alter that fact. The same, unfortunately, cannot be said for the decision of the Court of Appeals.

To illustrate just how far afield the lower Court went we need do no more than refer to *The Aquitania*, 20 Fed. (2d) 457 (C. C. A. 2), which it held to be controlling, and which enabled the Court to create the dilemma on whose horns it found the petitioners to be impaled. There the steamer *Aquitania* collided with the fishing schooner *Malicia*, causing the deaths of the five members of the schooner's crew.

The decedents' representatives sued the Cunard Steamship Company, Limited, owner of the *Aquitania*, at common law, claiming damages amounting to $205,000. The Cunard Line then filed a petition for limitation of liability, posting an *ad interim* stipulation for $9,225,276.30, the value of the *Aquitania* and her pending freight. Because of the tremendous difference between the claims filed and the ship's value, the Court held that limitation proceedings could not be invoked by the ship-owner to bring all claims into concourse, there being no possibility that the claims would equal the ship's value.

To make the *Aquitania* decision applicable to the case at bar (disregarding the conflict of laws question) we would have to treat the figure of $325,000., which the petitioners claim to be the limit of their liability under the Belgian law, as representing the total amount of claims involved, and then compare that figure with $1,000,000., the value of the *Norwalk Victory*. And that is just what the Court of Appeals did. Certainly it requires no extended argument from us to demonstrate the error in this reasoning. For instead of having claims which total, in the aggregate, but a fraction of the value of the ship and her freight (the limit of liability under our law) as in *The Aquitania*, we have claims aggregating $2,000,000. as against an asserted limitation of liability of $325,000. Since, moreover, the Court disclaimed any intention of deciding the conflict of laws question, we do not understand why it referred to the value of the *Norwalk Victory* at all, as that was an entirely irrelevant matter unless the law of the United States were to be applied.

II.

The respondents' discussion of the history of limitation of liability and the methods of invoking it.

In their first point (pp. 14-22) the respondents' counsel have gone deeply into the history of the limitation of liability laws of different countries and the reasons underlying them. There can, of course, be no dispute between us here, for we all know that the maritime nations of the world, with the object of building up their merchant marines, have held forth inducements to encourage the investment of capital in the building and operation of ships, and of these inducements limitation of liability has been one of the most important. But as interesting as this history is, we do not see that it throws any particular light on the immediate problem at hand, unless, as the Government's counsel indicate, it lends support to the petitioners' contentions.

Counsel, in their second point (pp. 23-27), then proceed with an outline of the methods by which limitation of liability may be secured in the United States, England and Belgium. We observe that they have gone outside the record for material for their exposition of the procedure in Belgium (pp. 25-27). While we do not have any particular objection to this slight irregularity we do not vouch for the accuracy of the statements.

What this of course all leads up to is the conclusion which our opponents ask the Court to make, that limitation of liability is a remedy. On page 9, in their Summary of Argument, Point I, after remarking that limitation of liability stems from European protectionist doctrines of the 17th century, they say that its origins, nature and procedures "illustrate why our courts have always held that it pertains to remedy". One might think from this that the

rule contended for has existed from time immemorial, whereas the first mention of the word "remedy" in connection with limitation of liability was made by Mr. Justice HOLMES in *The Titanic*.

On page 6, in stating the District Court's opinion, counsel compare a limitation of liability proceeding to a proceeding in bankruptcy. (This comparison, however, was not in the opinion.) Again, on page 27, they liken it to a creditor's bill or bankruptcy. In drawing this analogy they pass over the objectives which the ship-owner and the debtor are seeking. The ship-owner's final objective, of course, is the limitation of his liability, although numerous procedural steps must be taken before he can secure it. What the debtor in bankruptcy looks forward to is a discharge from the burden of his debts after an adjudication of bankruptcy. The debtor is then entitled to a discharge provided that he has fully and faithfully complied with the provisions of the Bankruptcy Act. Would anyone think of calling a discharge of a debtor in bankruptcy a remedy? No, it is a statutory right assured to a bankrupt upon his fulfilling the conditions of the Bankruptcy Act. The same is true of a limitation of liability proceeding, the final result of which is the fixing of the amount of the ship-owner's liability, in accordance with a prescribed standard, and the satisfaction of the final decree out of the limitation fund. To call this ultimate objective of the ship-owner a remedy is, to our mind, a contradiction of terms.

We note that counsel, in spite of their elaborate discussion of limitation of liability procedures, have had very little, if anything, to say about limitation when pleaded as a defense to a libel in admiralty, which was the procedure adopted by the ship-owner in *The Scotland*, 105 U. S. 24, as we have seen. Such procedure is a very simple one indeed, where the interested parties are before the court, and involves little more than the disposition of an ordinary admiralty suit.

The fact that limitation of liability is pleadable as a defense is further proof of the weakness of the respondents' argument, for if limitation of liability when invoked by petition is a remedy it would be equally a remedy when interposed as a defense in an answer. But whoever heard of pleading a remedy as a defense? While an answer to a libel is in itself of course procedural, the defenses pleaded in the answer manifestly are in a different category. They are the assertion of rights.

On page 21 reference is made to Article 12 of the Brussels Limitation Convention, reserving the right to the Contracting States not to apply the Convention rules in favor of a non-contracting State, and it is suggested that a Belgian court might not enforce the Convention rules in favor of the *Norwalk Victory* since the United States has not adhered to the Convention. Well, the Convention has been in force in Belgium for over 17 years, with no intimation of a withdrawal of its benefits from American nationals in appropriate cases, and at this juncture in world affairs, with the United States supporting the Western Union and the Atlantic Alliance in the offing, it is safe to say that any such action by Belgium is wholly beyond the realm of probability. Furthermore, the withdrawal of the Convention's benefits would be a matter for the political and not the judicial branch of the Belgian Government. There will be time enough to consider Article 12 when it is enforced.

On page 11, in their Summary of Argument, Point III, and in their third point (pp. 28-32) counsel cite varying benefits to be derived from different limitation of liability systems, depending upon circumstances, and undertake to say what we would have done had the *Norwalk Victory* instead of the *Merganser* been sunk. They cite *The Titanic* to illustrate their point. It is a classic example indeed. When the *Titanic* went down 1490 people lost their lives. All that was left were a few lifeboats and the pending freight and passage money, which, added together, made a

limitation fund of about $61,000 under American law. But under the British law, at 15£ per ton, the fund would have been several million dollars. We could by way of retort ask our opponents whether they would be arguing so strenuously for the American law if the *Norfolk Victory* had been sunk. We dare say that under such circumstances they would have been glad to receive $325,000. But arguments of this sort lead us nowhere. The question is, not what foot the shoe is on, as counsel remark, but what the applicable law is, regardless of benefits or detriment to either side.

On page 30 it is said that the conflict of laws question now before the Court is substantially the same as the one certified in *The Titanic*, and it is argued that there is no difference in principle between a tort committed on the high seas and one committed within a foreign jurisdiction. We must dissent emphatically from these views and believe that our position is sustained by the two lines of decisions cited in Points I and II of our main brief.

Our opponents, by a forced process of reasoning, attempt to show that *The Titanic* was decided by the District Court, 200 Fed. 501 (S. D. N. Y.) on the same basis as though the disaster had occurred in Southampton harbor, and suggest that the effect of this Court's decision in that case is to apply our limitation of liability law to a "foreign tort." For instance, on page 32, they say that the ultimate question in *The Titanic*, as here, was "whether the foreign limitation statutes of the *locus delicti* or those of the forum govern." Again, on page 34, they say that *The Titanic* involved a "foreign tort". They fall into the same error in referring to *La Bourgogne* on page 34. But where was the *locus delicti* in the case of the *Titanic*? Certainly it was not in British waters. It was on the high seas, where no nation is sovereign. It is therefore incorrect to speak of the limitation law of England as though it were in effect where the tort occurred.

Judge Hough, as we have pointed out in our main brief (pp. 20, 21), decided the *Titanic* case on the basis of Mr. Justice Bradley's dictum in *The Scotland*, that if two vessels of the same nationality should collide on the high seas, the law of their common flag would be applied in ensuing litigation in this country.

The statement on page 31, that "tort liability on the high seas is determined by the law of the flag," is too broad. It depends upon the circumstance. The case of *O'Neil v. Cunard White Star, Limited*, 160 Fed. (2d) 446 (C. C. A. 2), cited on page 31, involved the death of a British seaman on a British vessel on the high seas and in such a situation it was only natural that the British law should be applied. The same is true of *Sonnesen v. Panama Transport Co.*, a decision of the New York Court of Appeals, as yet unreported, which also is cited on page 31. But we do not see what all this has to do with the question as to what is the applicable limitation of liability law in the case of a tort committed within the jurisdiction of a foreign country.

On pages 32 and 33, in discussing *The Scotland*, counsel say that the question there was whether the American or the British limitation statute should be applied. We find no such alternatives suggested in the opinion. The only statute in question was that of the United States.

III.

The decisions of the lower courts and other authorities cited by the respondents in support of their argument that the United States law as to limitation of liability applies.

On pages 28, 29 reference is made to *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), also 114 Fed. (2d) 361 (C. C. A. 2), and, on pages 35 and 36, to *Royal Mail Steam Packet Co.* v. *Companhia de Navegacao Lloyd Brasileiro*, 31 Fed. (2d) 757 (E. D. N. Y.). But, as pointed out on pages 24 and 25 of our main brief, the statements of the courts in those cases as to the applicable limitation of liability law were purely dictum.

In the footnote on pages 29 and 30 counsel refer to the provisions of the Brussels Collision Convention with respect to the determination of liability in proportion to the degree of fault in mutual fault cases, and compare that rule with the American mutual fault rule, under which the cargo on the carrying ship can recover 100% against the non-carrying ship, with the right of the non-carrying ship to set off or recoup 50% of such recovery against the other vessel. Referring again to *The Mandu* in the footnote, they say that the Court there determined the substantive collision liability and damages under the *lex loci delicti*. As we have emphasized in our main brief, however (p. 16), the effect of that decision was to limit the liability of the steamer *Mandu*, the non-carrying vessel, to 20% of what her liability would have been had our law been applied. The Court, in fact, had to admit that this was a limitation of liability. It might be noted in this connection that the Collision Convention's provision as to the apportionment or allocation of liability only comes into force after fault has been found, and yet the Court in *The Mandu* classified the provision as a right and not a remedy. That the Con-

vention, as indicated in this footnote, states that it shall not affect the rules in force in each country regarding the limitation of ship-owner's liability cannot alter the fact that it actually does place a limitation on the liability of the colliding ships, where both are found at fault.

On page 28 there is cited section 411 of the Restatement, Conflict of Laws, saying that limitation of liability in a maritime cause of action is determined by the law of the forum irrespective of the law which created the cause of action. That, however, is obviously no more than an attempt to restate Mr. Justice HOLMES' opinion in *The Titanic*. Certainly the restatement is incorrect if we are right in our position that limitation of liability, based on a maritime tort occurring in a foreign country, is determined by the law of that country.

On page 34, in a footnote, *The Thingvalla*, 48 Fed. 764 (C. C. A. 2), is cited. We do not see what possible application that case has. There the petitioner, a Danish corporation, owned both the steamers *Thingvalla* and the *Geiser*, which collided on the high seas. Various insurance companies and others interested in the cargoes lost made claim on the *Thingvalla*. The District Court exonerated the vessel, *The Thingvalla*, 42 Fed. 311 (E. D. N. Y.) and its decree was affirmed. The Court consequently did not have to decide the question of limitation of liability. The headnote in the District Court report erroneously states that the petitioner was held "entitled to limitation of its liability." What the Court actually held was that the petitioner was "entitled to *exemption* from liability". (Italics ours).

The case of *The Norge*, 156 Fed. 845 (S. D. N. Y.), also cited in the footnote on page 34, certainly is no authority for the respondents. There the Danish steamship *Norge*, while en route from Copenhagen to New York, struck a derelict or some unknown obstruction and sank, causing the loss of several lives. The owner of the *Norge* petitioned

for limitation of liability and the representatives of the decedents filed claims in the proceeding. The Court found the *Norge* free from fault and dismissed the claims. While the concluding sentence of the opinion (p. 850) said that the petition was sustained, evidently the petition was in the usual form asking for exoneration from or limitation of liability, and what the Court undoubtedly meant was that the prayer for exoneration in the petition was sustained.

In the same footnote the respondents, strange to say, cite an unadjudicated case, *The Edmund Fanning*, as an authority. According to their statement an American ship and her cargo were lost in an Italian port and the owner invoked the American limitation of liability statute. The reason probably was that the American law, in view of the loss of the ship, presumably was more favorable to the ship-owner than the Italian law. What bearing this has on the questions here involved is not apparent to us.

On page 34 *The State of Virginia*, 60 Fed. 1018 (E. D. N. Y.), is cited as evidence of the intent of *The Scotland*, *supra*. (Just what intent is meant is not explained.) There Judge BENEDICT allowed limitation of liability to a British ship-owner in the case of the stranding of its vessel on Sable Island. No reasons were given for the Court's conclusion. We think that the District Court in *The Titanic*, *supra*, aptly characterized the *Virginia* decision. It pointed out (p. 507) that Judge BENEDICT's decisions in the District Court in *The Scotland*, *supra* and *The Great Western*, 118 U. S. 520, which denied the right of foreign ship-owners to limitation of liability under United States law, had been reversed and observed that these reversals apparently led him to change his views and that in doing so he must have overlooked the qualification of the general rule stated by Mr. Justice BRADLEY in *The Scotland*.

The case of *The Gypsum Prince-Voco*, 1945 A. M. C. 585 (S. D. N. Y.), cited on page 36, was decided by a Special

Commissioner and surely adds nothing to the subject under consideration. There the vessels collided in Delaware Bay and the *Gypsum Prince* was found solely at fault and it was stipulated that her owner was entitled to limitation of liability. Various questions were then submitted to a Special Commissioner, one of which was the ship-owner's claim of right to limitation under the American law. In his report the Commissioner referred to limitation of liability as being a remedy. The report was not passed on by the Court as a settlement was reached in accordance with the report. Since the collision occurred in waters of the United States we do not understand how any question could have arisen about the application of our limitation law. We agree with the Commissioner that the American law applied but not on the ground that it was a remedy.

IV.

The respondents' comments on the decisions applying the *lex loci delicti*, cited in Point I of our main brief.

On page 37 counsel brush aside the cases cited in the first point of our main brief with the cursory comment that they are not applicable because they were non-maritime, as if that made any difference in the principles involved. Furthermore, the case of *The Mandu*, 102 Fed. (2d) 459 (C. C. A. 2), cited and discussed on pages 15 and 16 of our main brief, was a collision case.

Counsel further refer to this group of cases (apparently meaning all of them) as being exceptional ones in that they supposedly involved statutes creating rights unknown to the common law, which by their terms limited the measure of recovery under the rights thus created. This, we submit, is a wholly illogical point of distinction and, furthermore, the statement is not correct.

In *Northern Pac. R. Co.* v. *Babcock*, 14 Sup. Ct. Rep. 978 (154 U. S. 190) the death statute of Montana, where Munro was killed, had no limit on the amount recoverable. It was Minnesota, where the suit was brought, which imposed the limitation. In *Cuba Railroad Company* v. *Crosby*, 222 U. S. 473, no statutory cause of action, so far as appears, was asserted, the action being one for personal injuries due to negligence. In *Western Union Telegraph Company* v. *Brown*, 234 U. S. 542, involving negligent delay in the delivery of a telegram, the plaintiff, it is true, recovered under the South Carolina Civil Code, but we should suppose that a cause of action for negligently delivering a telegram was one known to the common law. In *Mosby* v. *Manhattan Oil Co.*, 52 Fed. (2d) 364 (C. C. A. 8), the suit was based upon the creation of a nuisance, which most assuredly was actionable at common law.

As Mr. Justice Holmes said, in *Western Union Telegraph Company* v. *Brown*, "The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious * * *". And yet that is just what the respondents are trying to have done. They are founding their case on an obligation created by the law of Belgium but they want to impose a liability of a million dollars on the petitioners when the law of Belgium provides a limitation of liability to approximately $325,000.

If the language of *The Titanic* were literally followed, as the respondents contend, it would mean that there would be an exception, in the case of limitation of liability, to the rule laid down in the foregoing group of cases, with no logical reason for such an exception.

V.

The Government's status in this case and the effect of its being exempted, as a corporation sovereign, from any obligation to give a bond.

In their fifth point (pp. 40-42) the respondents' counsel profess great surprise that the Government is urging the point that it was not required to file a bond. They speak as though their admission that no bond was required of the United States disposes of the matter and renders the point moot. This is a most peculiar attitude to take, considering that one of the grounds the District Court gave for its dismissal of the petition was that the petitioners had not posted the bond required by the statute.

The point, contrary to our opponents, is an extremely important one and the reason why it is important is this: The respondents apparently contend that, regardless of any question of conflict of laws, the petitioners failed to comply with R. S. § 4285 and Admiralty Rule 51 of this Court because they did not transfer their interest to a trustee or furnish a bond for that interest; that the term "interest" in our law means all of the petitioners' interest and not some lower figure fixed by the law of a foreign country. Whatever the merits of this contention may be with respect to Black Diamond—and we have argued in our main brief that the word "interest" should be given a liberal and not a literal interpretation where a foreign law is involved—the argument completely fails as far as the United States is concerned. In other words, since the United States did not have to give any bond at all, nor was it required to make a transfer of its interest to a trustee, the fact that it did neither of these things constitutes no ground for dismissing the petition. In short, the conflict of laws question

which this petition presents is, we believe, squarely before the Court for decision.

It should be repeated here, parenthetically, that the petitioners have invoked the Belgian law not only by this petition but by defense in their answer to the respondents' libel, under the authority of *The Scotland, supra,* and *The Chickie,* 141 Fed. (2d) 80 (C. C. A. 3), and several other cases to the same effect. The decisions holding that limitation of liability is pleadable as a defense refer to R. S. § 4283. It seems clear, however, that where ship-owners rely on a foreign limitation law, as here, it can be raised by way of defense without regard to R. S. § 4283.

The respondents' counsel, making light of the argument, seek to relegate the Government to a minor role in the case. They call it "a nominal party" herein; this in spite of the fact that the chief explanation they have vouchsafed for bringing their suit in the United States is their desire to hold the United States, as owner of the *Norwalk Victory,* liable in the event that Black Diamond is not able to satisfy a decree obtained by them. This does not strike us as an inconsequential matter.

On page 41 the comment is made that counsel for the Government did not participate in the arguments below. The explanation of this is extremely simple. Black Diamond was the bareboat charterer of the *Norwalk Victory* and, as owner *pro hac vice,* was responsible for her navigation. Therefore the United States naturally looks to Black Diamond to make good any loss sustained by third parties because of negligent navigation, if negligence is found. The writer's firm not only are proctors for Black Diamond in the District Court but also, in accordance with the usual custom in cases of this kind, are counsel for the United States, represented by the United States Attorney for the Eastern District of New York. The separate appearances here are, we understand, due to a rule of the Government requiring that it must be represented by the

Solicitor General in all cases before this Court in which its interests are involved.

On page 42 it is suggested that the Government's argument, based upon its exemption from any requirement as to posting a bond, may safely be ignored in order to avoid a confusion of the issues. Counsel undoubtedly would like to ignore the argument, but far from confusing the issues, it raises one of the most important points in the case.

VI.

The *Norwalk Victory-Merganser* litigation in England and the petitioners' so-called "dilemma".

The respondents' counsel, in their sixth point (pp. 43-46), have conjured up a new dilemma into which to precipitate the petitioners, or at least Black Diamond. It arises, it seems, out of the fact that Black Diamond has been sued in England, which, it is said, is Black Diamond's own fault. On pages 44 and 45 they refer to information received from their English solicitors that our solicitors agreed with the solicitors for the *Merganser*, almost immediately after the collision, to submit to British jurisdiction with respect to the claim for the loss of the *Merganser*, and they insinuate that this was a collusive submission (p. 45). We take decided exception to this statement. Black Diamond submitted to British jurisdiction under a threat that the *Norwalk Victory* would be arrested. Since she was then on her way from Antwerp to Rotterdam the threat of arrest meant arrest at Rotterdam; for certainly the *Merganser's* solicitors, in a case of this size, never would have taken the risk of allowing her to leave that port. Since the jurisdiction of a British Court was preferred to that of a Continental Court, Black Diamond agreed to appear in London. Moreover, it undoubtedly was amenable to process *in personam* in London as it maintained an agency there.

On page 45 it is said that the fact that Black Diamond has posted a bond equivalent to $1,000,000, in the English suit is a complete refutation of our claim that limitation attaches to the right. The argument is wholly without merit. Black Diamond gave bail in this amount because it had no alternative except to file a petition for limitation of liability, which would have entailed an admission of liability, as our opponents concede. If the bail demanded was too high, Black Diamond, when the case is concluded, can ask that the *Merganser*'s owners be condemned in the cost of excessive bail. But bail cannot be reduced to the amount of Black Diamond's statutory liability in England, in advance of limitation proceedings, unless the opposing side concedes its right to limit, which they have not yet seen fit to do. There is no question of conflict of laws in England, as our opponents seem to imply, for England, our solicitors inform us, is one of the three countries in the world which do not apply the doctrine of conflict of laws, the other two being China and Japan. Because of this peculiar situation, the English limitation statute will ultimately be applied in the English litigation.

A further element in the new "dilemma", it is said, was Black Diamond's insistence on initiating limitation proceedings here under the Belgian law, when it should have known that American law applies. It could have had a *forum concursus*, according to our opponents, by the simple expedient of posting a bond for $1,000,000! We pause to wonder how simple this would have been in view of the bail for the equivalent of a million dollars already posted in England. Had we ever entertained such an idea it would, without doubt, have been impossible of fulfillment in the short time at our disposal, for the respondents' suit was not commenced until within two weeks of the expiration of the statutory period for instituting limitation proceedings. Furthermore, a complete concourse could never have been secured anyway as there was no way of forcing

the *Morgancer's* owners to come into proceedings in the United States.

In a further attempt to justify resort to our Courts, when the foreign courts were open to them, counsel for the respondents emphasize the diverse nationalities of the damage claimants. But this, we submit, is no excuse at all. In any case, let us get the record straight on this subject. Twenty claimants joined as co-libellants in the original libel. Recently an amended libel has been filed in which the claimants have been increased to forty. Aside from His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, and the Kingdom of Belgium, the nationality of the damage claimants is as follows: British, twenty-four, Belgian, eleven, Swiss, two, and American, one. Thus, the great majority of the parties are English and could have been restrained from suing here, had it been possible for Black Diamond to institute limitation proceedings promptly in England, without conceding liability.

No, Black Diamond is not in any dilemma of its own making. It would be more accurate to say that it is enmeshed, through no fault of its own, in an international snarl, which, if not unravelled, bids fair in the final wind-up to deprive it, to all intents and purposes, of any real limitation of liability.

VII.

Concluding discussion as to the difference between rights and remedies.

The difference between a remedial law and a law creating substantive rights is strikingly illustrated by the Arbitration Law of New York, L., 1920, ch. 275; Consol. Laws, ch. 72, providing a means of enforcing arbitration clauses in contracts. The New York Act, a pioneer in this field of

legislation, was followed in a few years by the United States Arbitration Act, 9 U. S. C. A. §1 *et seq.* The constitutionality of the New York law in matters of admiralty and maritime jurisdiction was, it will be remembered, upheld by this Court in *Red Cross Line* v. *Atlantic Fruit Company*, 264 U. S. 109, and the constitutionality of the federal Act was likewise sustained in *Marine Transit Co.* v. *Dreyfus*, 284 U. S. 263.

It was not long after the enactment of the New York law that the question arose, in *Matter of Berkovitz* v. *Arbib & Houlberg*, 230 N. Y. 261, as to whether the Act was retroactive, the arbitration agreement in suit having been made before the law went into effect. Mr. Justice CARDOZO, speaking for the Court, said that a promise to arbitrate even before the Act was neither illegal nor a nullity, although public policy then forbade that it be specifically enforced. Holding that the law was retroactive, he stated (p. 270):

> "The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies. * * * The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared. Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to sales already made. It vindicated by a new method the obligation then existing."

The Court of Appeals for the Second Circuit, considering the United States Arbitration Act, reached the same result. *Murray Oil Products Co., Inc.* v. *Mitsui & Co., Limited*, 146 Fed. (2d) 381 (C. C. A. 2).

When Congress passed our limited liability law in 1851 it gave life to no pre-existing thing as it and the New York Legislature did in making agreements to arbitrate enforceable. Before 1851 American ship-owners, when disaster

befell their ships, were liable in full, as held in *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 722.

If any further refutation of the respondents' argument that limitation of liability is a remedy were needed, these arbitration acts, we believe, supply it.

Dated, New York, December 16, 1948.

Respectfully submitted,

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